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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 13.09.2023***
Pronounced on: 17.11.2023

\+ **CRL.A. 332/2023 & CRL.M.(BAIL) 539/2023**

VISHNU DAS THROUGH PEHEROKAR ..... Appellant

Through: Mr. M.S. Karwasra, Advocate

versus

GOVERNMENT OF NCT OF DELHI & ANR. .. Respondents

Through: Mr. Naresh Kumar Chahar, APP for the State with SI Amit Kumar, P.S. Govindpuri, Delhi Ms. Tara Narula and Ms. Shivangi Sharma, Advocates for R-2

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (‘*Cr.P.C.*’) has been filed by the appellant impugning judgment of conviction and order on sentence dated 10.10.2022 and 31.10.2022 passed by learned Additional Sessions Judge-06 (POCSO), South East District, Saket Courts, New Delhi (*‘Trial Court’*) in SC No. 2662/2016, arising out of FIR No. 636/2016 registered at Police Station Govindpuri, Delhi for offence

punishable under Section 376/506 of Indian Penal Code, 1860 (‘*IPC’*) and Section 4/6 of Protection of Children from Sexual Offences Act, 2012 (‘*POCSO Act’*).

2. Brief facts of the case are that the present FIR was registered on the basis of complaint made by the victim on 01.08.2016 at Police Station Govindpuri, Delhi, alleging that around 4-5 months ago, when she was playing Badminton with her sister near her house at about 8:00 PM, the accused who used to work as fish seller near her house had asked her to accompany him and had offered her chips etc. Thereafter, accused/appellant had forcefully taken the victim to a park and despite her refusal, he had forced her to drink something. Thereafter, the accused had sexually assaulted her and had inserted his private part in the private part of the victim, after which, she had pushed him back. The accused had then dropped her back at her home, and had threatened her that if she discloses the incident to anyone, he would inflict harm on her with a knife. Thereafter, due to the fear of threats extended by the accused, accused had taken the victim to another place i.e. Ghaati and when no one was around, he had again sexually assaulted her. The victim had further alleged that after about a month, the accused had again come to her house and asked her to go to the fish shop. Thereafter, he had taken her to RZ house, and had again sexually assaulted her. The victim had alleged that she had informed her mother on 01.08.2016 that she had missed her periods for about five months but she had lied to her because she had been threatened by the accused. On the basis of this information, the present FIR was registered. The victim was medically examined

at AIIMS Hospital, and her statement under Section 164 of Cr.P.C. was also recorded. On 02.08.2016, the accused/appellant was arrested in the present case.

3. After completion of investigation and filing of chargesheet, charges under Section 506 of IPC and Section 6 of POCSO Act were framed against the appellant. Vide judgment dated 10.10.2022, the learned Trial Court had convicted the appellant for offence under Section 506 of IPC and Section 6 of POCSO Act, and the concluding portion of the judgment reads as under:

> "...On the basis of above said discussions and in the light of the statement of victim child, it can be safely concluded that the victim child was sexually abused by committing upon her aggravated penetrative sexual assault by the accused and making her pregnant and accordingly there are enough evidence against the accused to punish him under Section 6 of the POCSO Act. It has also come in the deposition of the victim child that accused threatened her not to disclose this act to anyone, otherwise he would kill her and her mother. Prosecution has proved this fact successfully and beyond any reasonable doubt and accordingly, it has been proved that accused has committed the offence punishable under Section 506 IPC upon the victim child. On the above discussion, l am of this considered opinion that prosecution has discharged its burden and accused Vishnu Das @ kala @ Tapan has been convicted for the offence as charged under Section 6 of the POCSO Act as well under Section 506 IPC..."

4. Vide order on sentence dated 31.10.2022, the appellant was sentenced to undergo rigorous imprisonment for a period of 10 years and fine of Rs.1,000/- and to undergo simple imprisonment for a period of 15 days in default of payment of same, for offence under Section 6 of POCSO Act. Further, he was sentenced to undergo rigorous imprisonment for a period of 02 years and fine of Rs.1,000/-

and to undergo simple imprisonment for a period of 15 days in default of payment of same, for offence under Section 506 of IPC.

5. Aggrieved by his conviction and order on sentence, the present appeal has been filed by the appellant.

6. Learned counsel for the appellant argues that the age of the victim is not proved in this case. It is stated that it was a consensual relationship and the victim was not 13 or 14 years of age at the time of the alleged incident. It is further submitted that there are several contradictions in the statements of prosecution witnesses and even the victim has made improvements in her statements given to the police under Section 161 of Cr.P.C., in statement recorded under Section 164 of Cr.P.C. and in her testimony before the learned Trial Court. It is also stated that the testimony of mother of victim is highly unreliable as far as the age of victim is concerned. It is argued that the appellant has been falsely implicated in this case and therefore, the present appeal be allowed.

7. Learned APP for the State, on the other hand, draws attention of this Court to the statement of the accused and to certain questions which were answered by the appellant himself wherein he does not say that there was consensual sexual relationship between him and the victim. It is also argued that the age of the victim has been proved beyond doubt, therefore, present appeal be dismissed.

8. This Court has heard arguments addressed by learned counsel for the appellant and learned APP for the State, and has perused the material on record as well as the impugned judgment.

9. In the present case, the prosecution had examined 17 witnesses including the minor victim before the learned Trial Court. The statement of accused was recorded under Section 313 of Cr.P.C. and he had examined 04 witnesses in his defence, who were his family members.

10. The minor victim was examined as PW-1 before the learned Trial Court, who deposed that her uncle was running a shop in fish market and she used to go there often, and the appellant used to work at the shop adjacent to the shop of her uncle.

11. She has further deposed that one day at about 08:00 pm when she was playing badminton in her street with her cousin, the accused had come there and asked her to accompany him and had offered her chips to eat. She had gone with him and when she had reached near a chemist shop, the accused had brought a cold-drink and offered her to drink. After drinking the same, she had felt dizzy. The accused had thereafter taken her to a park and in the park, he had committed wrong act with her i.e. inserted his private part into her private part. Thereafter, the accused had left her near the street of her house. She has further deposed that after one or two weeks, he had again come with a knife and had asked her not to tell about this incident to anyone, or else, he would kill her. She had further deposed that accused had further taken her to a road and there was a *ghati* and he had made her drink something forcibly and thereafter he had again established physical relations with her near the street. The victim has further deposed that thereafter, she had missed her periods and had started vomiting. The accused used to call her but she did not go to

him under fear and one day when she had gone to the house of her *chachi*, they observed that she was pregnant. They had conducted a pregnancy test using a kit and she had been found positive for pregnancy. Upon inquiry by her relatives, she had narrated the entire facts to her *chachi* and *bua*. Her *bua* had told these facts to her uncle and her uncle had caught the accused and thereafter, a lady from NGO was called and facts were narrated to her. The police was also called thereafter and she had narrated the facts to police. The victim had correctly identified the accused before the learned Trial Court. She had further deposed that accused had also taken her to one RZ house and committed rape upon her, but she was not aware about the date and month of such incident. She had further deposed that she was studying in Tanki Vala School near Gurudwara, Govind Puri and it was a Government school. She had also deposed that after birth of her son, blood samples of her and her child were obtained by police.

12. DNA report in this case has concluded that accused Vishnu Das and the victim were biological mother and father of the baby born to the victim.

13. The mother of the prosecutrix had deposed as PW-5 before the learned Trial Court, and had stated that during the summer of 2016, her daughter i.e. minor victim had complained about pain in her stomach and upon asking, she had told her that she was pregnant. Her daughter had further told her that one Vishnu used to forcibly establish physical relations with her by giving some substance to her after which she used to feel dizzy. When she had taken her daughter

to AIIMS, the doctors had confirmed pregnancy, and she had subsequently given birth to a male child.

14. The father of the victim had deposed as PW-6 before the learned Trial Court, and had stated that her daughter i.e. minor victim was around 15 years of age and was studying in a Government School in Govind Puri, Delhi. He had further deposed that on 01.08.2016, her daughter had told his wife and her sister that one Vishnu used to rape her after making her drink some substance which used to make her dizzy. It was further stated that after knowing this, he had taken his daughter alongwith his wife to the police station where they had lodged a complaint against the appellant herein.

15. The minor cousin sister of the victim had deposed as PW-7 before the learned Trial Court and had stated that the victim is the daughter of her *mami*, and one day while they were playing badminton, one boy had come and had taken her cousin sister i.e. victim with him for eating some food.

16. Ms. Kamlesh Prasad, who was the In-charge of SDMC, Nigam Pratibha School DDA Slum, Kalkaji, New Delhi had deposed as PW-8 before the learned Trial Court and had verified that the minor victim, the date of birth was 07.11.2003, which was recorded based on the affidavit of the mother of victim in the school records.

17. The main contention of the learned counsel for appellant is that at the time of the incident, the victim was not a minor, and the evidence regarding the age of the victim is not reliable and the age proof from the school have been obtained by the NGO after falsifying the records. It was also his contention that the parents of the victim

also did not depose the exact date of her birth and as to when they had got her admitted in the school and on strength of which documents, and thus, the accused cannot be held liable under the provisions of POCSO Act. In this regard, this Court has gone through the findings recorded by the learned Trial Court regarding the age of the victim. This Court is in agreement with those findings and notes that the age of the victim has been duly proved by the prosecution, and based on the material placed on record, on the basis of original documents pertaining to the admission of victim, including attested copy of admission register, admission form and the affidavit of the mother of victim which provides the date of birth of the victim as 07.11.2003 in school records. This Court further notes that the school record pertains to the year 2010 when the victim was admitted in the school in first standard, which mentions the date of birth of victim as 07.11.2003. These records of the year 2010 could not have been manipulated by the school. The parents of the victim had also deposed that the victim was about 15 years of age at the time of recording of testimonies and thus, about 13-14 years of age at the time of commission of offence. Thus, the contention of the learned counsel for the appellant that the victim was not minor at the time of incident cannot be sustained in view of the material available on record.

18. Learned counsel for the appellant had also argued that there are material contradictions in the statements of the witnesses especially the minor victim, which goes to the root of the present case. However, having gone through all the statements of the victim and

the Trial Court Record, this Court is of the view that the minor victim has supported the case of prosecution on all major aspects, and some minor inconsistencies, which do not affect the case of prosecution, in the statement of a minor victim aged about 14 years who has been subjected to rape by the appellant herein are natural due to the state of mind and the fallacies of human memory, and the same cannot be treated to be fatal to the case . The Courts while dealing with such cases are required to view the statements and facts in accordance with the material placed on record and cannot expect the witnesses to state each and every detail related to the incident in same words at every point of time. This Court cannot loose sight of the fact that the victim at the time of incident was about 13 years of age and she had subsequently become pregnant due to the sexual assault committed upon her by the appellant. Thus, the statements of such minor victims have to be examined from the lens of delivering justice in accordance with principles of fair criminal trial to accused and victim, and not on the yardstick of strict factual accuracy of words. It is the substance of the testimony which is to be appreciated. Needless to say the economic, financial and educational background of victim, the trauma they have faced due to sexual assault and giving birth to child of accused can, at no point of time, be ignored by the courts.

19. As far as the arguments of the learned counsel for the appellant that the relationship between the victim and the accused was consensual is concerned, this Court is not in agreement with the same since the victim in her statement before the police, in her statement under Section 164 of Cr.P.C., as well as in her deposition before the

learned Trial Court has fully supported the case of prosecution and has clearly deposed that she was sexually assaulted by the accused on three occasions. She has also deposed specifically that she had been threatened with the use of knife and had been threatened that she will be killed in case she will disclose the incident to anyone. Though the appellant contends that the relationship was consensual between the parties, the entire record is contrary to his contention. The testimony of the wife of the accused i.e. DW-2 reveals that she has stated on oath that the victim used to come to their house and her husband did not like her visiting their home and that on one occasion, he had slapped her also. The accused himself in his statement recorded under Section 313 Cr.P.C. in question no. 1has given an answer to the question, that the victim was his friend but he did not establish any physical relation with her. However, in the cross-examination, a suggestion was also put to the victim/PW-1 by the learned counsel for accused that the physical relations were established between the victim and the accused with her consent. Thus, the accused on one hand, himself negates the consensual relationship or having ever had penetrative sexual intercourse with the victim child, and also at the same time contends that relationship was consensual.

20. In the present case, moreover, the medical evidence clearly establishes the factum of sexual intercourse between the accused and the minor victim. As per the DNA Analysis, the appellant was found to be the biological father of the child the victim had given birth to.

21. This Court is constrained to note that one of the defence taken by the accused in question no. 28 in his statement recorded under

Section 313 of Cr.P.C. is strange, where the accused is questioned regarding the DNA test and he being the biological father of the child born due to sexual assault to the victim, who was 14 years old. He had answered as follows:

> "I have no knowledge. Mother of the prosecutrix used to work in Hospital and she had borrowed money from me. I gave her Rs.20,000/-each on two occasion after taking loan. She had also taken my semen saying that she would get money for the same and that she would repay the amount borrowed from me. Samples must have been manipulated."

22. The defence that he had given his own semen in a bottle to the mother of the victim on her asking, since she had told him that she will be getting money by selling it, is one of the most unconvincing defences. At one stage of trial, he has denied sexual relationship, at another stage he states it was consensual and at the end of trial he comes up with the above defence which has to be rejected outrightly.

23. In this case, it is very unfortunate that the victim of sexual assault had given birth to a child born due to the sexual assault while she was only 14-15 years of age. Being a sexual assault victim forced to give birth to the child of the accused, she would have undergone unfathomable pain, trauma, and stress. In this case, it was not the victim alone who was a victim, it is also the entire family and the child born to the victim who are victims of this offence, through this Court has been informed that the child has been given in adoption by the concerned authorities as the victim could not afford to take care of him.

24. Therefore, having perused the impugned judgment and the entire evidence on record including the testimonies of the witnesses and the medical evidence, this Court is of the opinion that the case of prosecution has been proved beyond reasonable doubt.

25. Thus, this Court finds no infirmity or illegality in the impugned judgment of conviction and order on sentence dated 10.10.2022 and 31.10.2022, passed by learned Trial Court.

26. The appeal is accordingly dismissed alongwith pending application.

27. Copy of this judgment be forwarded to the Jail Superintendent concerned for information to the appellant who is in judicial custody.

28. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

NOVEMBER 17, 2023/ns